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Recommended Citation

49 Santa Clara L. Rev. 1103 (2009)

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BUSINESS, THE ROBERTS COURT, AND THE SOLICITOR GENERAL: WHY THE SUPREME COURT'S RECENT BUSINESS DECISIONS MAY NOT REVEAL VERY MUCH

Sri Srinivasan* and Bradley W. Joondeph**

INTRODUCTION

It has almost become cliché to call the Roberts Court a friend of American business. From antitrust to punitive damages to securities regulation to preemption, the conventional wisdom seems to hold that the current Justices have shaped federal law in ways favorable to commercial enterprise. Nonetheless, especially during the 2007–2008 Term, the Court has also handed down a number of decisions favoring plaintiffs (such as employees or consumers) at the expense of business litigants—decisions that have led some observers to conclude that characterizations of the Roberts Court as “pro-business” are “far too simplistic.”¹

One complication in drawing firm conclusions about the Roberts Court’s approach to business issues is that the current group of Justices has served together for only three years. There simply is not much of a track record from which to draw strong inferences. A more fundamental complication is that other explanatory variables—influences other than a decision’s import for American businesses—are certainly at play. This essay explores one such variable that may have been especially significant over the past three years: the

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1. Gina Passarella, *Former SG Knocks Pro-Business Label for High Court*, LEGAL INTELLIGENCER, July 17, 2008, at 1, available at <http://www.law.com/jsp/article.jsp?id=1202423032918>.

content of the arguments presented to the Court by the Solicitor General.

It is well known that the Solicitor General is an influential advocate at the Court. And it stands to reason that the views of the Solicitor General for the Bush administration may have been received especially favorably by the current group of Justices: seven of the Roberts Court's members were appointed by Republican presidents, and two were appointed by President George W. Bush himself. As a result, there was apt to be a fair measure of ideological affinity between the views of the Roberts Court and positions taken by the Bush administration's Solicitor General.

Perhaps unsurprisingly, given the basic commitments of the modern Republican Party, the Bush administration frequently filed briefs as *amicus curiae* supporting business litigants. But on a number of occasions, the federal government weighed in against business interests and in support of employees or consumers. And when it did, the Roberts Court nearly always ruled against the interests of business and in favor of the position advocated by the United States. How are we to understand this pattern? Does it suggest that the Roberts Court is actually more pro-government than pro-business? Alternatively, does it reflect a meaningful moderation in the Court's sympathy for business interests? Or does it signify something else still?

We suggest that the answer may be all or none of the above—in essence, that these decisions leave much unrevealed. Specifically, given the Bush administration's well-known reputation as a strong ally of business, its arguments *against* the interests of business likely carried a great deal of credibility with the Court. Consequently, decisions by the Roberts Court siding against business litigants, but in favor of the Solicitor General, may show only that the arguments of business litigants in those cases went beyond what the law could permit. At the same time, the Court's siding with the government in business cases may not illustrate the Solicitor General's influence *per se* as much as it reflects the general agreement between the Justices and the Bush administration on how best to resolve the legal questions at issue. Hence, the decisions may not tell us much about the Roberts Court's underlying attitudes towards business or the federal government—that is, whether, and

the extent to which, it is enduringly “pro-business” or “pro-government.”

This essay presents an empirical examination of the full universe of the Roberts Court’s decisions affecting the interests of business from January 2006, when Justice Alito joined the Court, to January 2009. As a purely descriptive matter, we find that the Court tended to reach results favorable to business interests, and that it tended to adopt the positions urged by the Bush administration. Moreover, when those two positions diverged—most saliently, in cases where the United States and the United States Chamber of Commerce filed opposing amicus briefs—the Roberts Court overwhelmingly sided with the government.

While these findings are interesting, our basic thesis is that there is no simple way to interpret these outcomes. Rather, it likely will take a different cohort of decisions to bring the Roberts Court’s general attitudes towards business and the federal government to the surface. Most assume the Obama administration will be less ideologically aligned with the current Justices than the Bush administration, and less apt to side with business interests on questions of federal law. If this comes to pass—and the Obama administration’s Solicitor General argues for outcomes contrary to business interests in a number of cases—it may then be possible to reach more definitive conclusions about the Roberts Court’s responsiveness to American business and the federal government.

I. BUSINESS, THE ROBERTS COURT, AND THE FEDERAL GOVERNMENT

In a *New York Times Magazine* article written roughly a year ago,² Jeffrey Rosen profiled the United States Chamber of Commerce and its increasing success in persuading the Supreme Court through its amicus filings to render decisions congenial to American business. The article, which begins by noting that the “affinities between” the Supreme Court’s building and the Chamber’s headquarters “seem to be more

2. Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES, Mar. 16, 2008, § MM (Magazine) at 38.

than just architectural,”³ chronicles the history of the Chamber’s efforts to influence the Court, and explains at length that the Chamber seems now to exert more influence than ever before. For example, Rosen notes, “[a]lthough the Court is currently accepting less than 2 percent of the 10,000 petitions it receives each year, the Chamber of Commerce’s petitions between 2004 and 2007 were granted at a rate of 26 percent.”⁴ “And ever since John Roberts was appointed Chief Justice in 2005,” Rosen observes, “the Court has seemed only more receptive to business concerns.”⁵

This perception of the Roberts Court as an institution increasingly aligned with business interests is widely shared. Indeed, it is conventional media wisdom that, with the additions of Chief Justice John Roberts and Associate Justice Samuel Alito, the newly constituted Court has been “good for business.”⁶ The Roberts Court is viewed by some as “‘even better for business’ than the Court led for two decades by the late Chief Justice William H. Rehnquist.”⁷

While the views expressed in Rosen’s article and other press accounts have largely remained confined to the domain of commentators and editorial boards, the image of the Roberts Court as “reflexively pro-business”—as the *New York Times* editorial board phrased it⁸—has occasionally caught the attention of elected officials as well. The best example may be the reaction to the Supreme Court’s five-to-four decision in *Ledbetter v. Goodyear Tire & Rubber Co.*⁹ The Court sided with Goodyear in holding that Lilly Ledbetter, a former Goodyear employee who alleged that she for years had been paid less than her male counterparts doing the same job, was too late in bringing suit for sex discrimination under Title VII of the Civil Rights Act of 1964.¹⁰ Goodyear’s position

3. *Id.*

4. *Id.*

5. *Id.*

6. David G. Savage, *High Court Is Good for Business*, L.A. TIMES, June 21, 2007, at A1; see also Alicia Mundy & Shirley S. Wang, *In Drug Case, Justices to Weigh Right to Sue*, WALL ST. J., Oct. 27, 2008, at B1 (labeling the Roberts Court as “one of the most pro-business [Courts] in 50 years”).

7. Savage, *supra* note 6 (quoting Maureen Mahoney, a leading Supreme Court advocate).

8. Editorial, *The Court and Workers*, N.Y. TIMES, June 21, 2008, at A18.

9. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 618 (2007).

10. 42 U.S.C. § 2000e (2006).

was supported by the Chamber of Commerce.¹¹

In the wake of *Ledbetter*, the *New York Times* editorial board, with a headline titled *Injustice 5, Justice 4*, decried that the “ruling is the latest indication that a Court that once proudly stood up for the disadvantaged is increasingly protective of the powerful.”¹² But the view that the Court had moved too far to the side of business extended beyond editorial boards and commentators. *Ledbetter*’s case also drew the attention of Congress, and led to the passage in the House of Representatives of the *Ledbetter Fair Pay Act of 2007*,¹³ intended to overrule the Court’s decision. Although the bill initially stalled in the Senate in the face of Republican (and Bush administration) opposition, a new Congress passed the bill in January 2009 and President Obama signed it into law.¹⁴

The *Ledbetter* case illustrates a potential—and little-noted—wrinkle in the widely accepted view that the Roberts Court is “reflexively pro-business,” for there was one party in *Ledbetter* and other business cases with which the Roberts Court has sided even more than the Chamber of Commerce: the United States. As has often happened in cases in which the business community has an interest in the outcome of a case, the Solicitor General filed an amicus brief in *Ledbetter* supporting the business side,¹⁵ the position that prevailed.

The importance of the Solicitor General—and the positions that he or she takes—in Supreme Court litigation is well-established. One Court observer has noted that

[t]he Court plainly provides the Solicitor General’s legal arguments with heightened respect because of the nature of his client—the United States—and the deference that the judicial branch naturally owes in many legal settings to the views of counsel representing the interests of the

11. See Brief of the Chamber of Commerce of the United States of America and the Nat’l Fed’n of Indep. Bus. Legal Found. as Amici Curiae in Support of Respondent, *Ledbetter*, 550 U.S. 618 (No. 05-1074).

12. Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18.

13. *Ledbetter Fair Pay Act of 2007*, H.R. 2831, 110th Cong. (1997).

14. See Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 30, 2009, at A1.

15. See Brief for the United States as Amicus Curiae Supporting Respondent, *Ledbetter*, 550 U.S. 618 (No. 05-1074).

two other branches of government.¹⁶

It is no wonder that the Solicitor General is often referred to as the "Tenth Justice."¹⁷

Although the media's general characterization of the Roberts Court as "pro-business," and its focus on the influence of the Chamber of Commerce, has generally left the role of the Solicitor General unaddressed, the position taken by the United States gained wide attention in at least one recent business case, *Stoneridge Investment Partners, L.L.C. v. Scientific-Atlanta, Inc.*¹⁸ The issue in *Stoneridge* arose from the Court's 1994 decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*¹⁹ The Court in *Central Bank* held that private actions under section 10(b) of the Exchange Act of 1934, the "catchall provision"²⁰ that generally prohibits securities fraud,²¹ fail to encompass aiding or abetting securities fraud. The courts of appeals subsequently split over whether so-called "scheme liability"—that is, the ability of an injured investor "to recover from a party that neither makes a public misstatement nor violates a duty to disclose but does participate in a scheme to violate"²²—nevertheless falls within the scope of section 10(b).²³

In the lower courts, the Securities and Exchange Commission (the "SEC") had taken the position that "scheme liability" claims were actionable by private parties as

16. Richard J. Lazarus, *Advocacy Matters before and within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1493 (2008).

17. See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

18. *Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008).

19. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

20. *Chiarella v. United States*, 445 U.S. 222, 235 (1980).

21. See Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2006).

22. *Stoneridge*, 128 S. Ct. at 767.

23. Compare *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040 (9th Cir. 2006) (holding that "scheme liability" was actionable under section 10(b)), *vacated*, *Avis Budget Group, Inc. v. Cal. State Teachers' Ret. Sys.*, 128 S. Ct. 1119 (2008), with *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007) (rejecting "scheme liability" theory of securities fraud), and *In re Charter Commc'ns, Inc., Sec. Litig.*, 443 F.3d 987 (2006).

securities fraud.²⁴ But while the SEC, as an “independent” agency, has independent litigation authority from the Department of Justice in lower courts, it lacks such independent authority in the Supreme Court.²⁵ Thus, after the Supreme Court granted certiorari to resolve the conflict among the circuits in *Stoneridge*—billed by Linda Greenhouse of the *New York Times* as “one of the most closely watched business cases in years”²⁶—a change in the government’s litigation position was a distinct possibility.

The importance of which side the Solicitor General would support escaped neither the media nor elected officials. Indeed, after the deadline for amicus briefs to be filed in support of the plaintiff-petitioners had passed—and it became clear that the government would side with business interests or with neither side—Senator Dodd, the Democratic Chairman of the Finance Committee, sent a letter to the Justice Department urging it to refrain from filing a brief in support of the business side (i.e., the respondents), a position for which the *Wall Street Journal* editorial board strongly criticized him.²⁷ And when the United States *did* file a brief supporting the respondents, the press was not alone in taking note,²⁸ as both sitting senators and congressmen, as well as former SEC commissioners, moved to present late-filed amicus briefs supporting the petitioner.²⁹

The belief that the Solicitor General’s position in *Stoneridge* would be highly influential may well have been correct. The Court sided in favor of the respondent businesses, the Chamber, and the government, holding that

24. See Brief of the SEC, Amicus Curiae, in Support of Positions that Favor Appellant, *Simpson*, 452 F.3d 1040 (No. 04-55665).

25. See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 263–65 (1994).

26. Linda Greenhouse, *Skeptically, Court Hears Fraud Case*, N.Y. TIMES, Oct. 10, 2007, at C1.

27. See Editorial, *Guilt by Contact*, WALL ST. J., Aug. 23, 2007, at A10.

28. See, e.g., Kara Scannell, *Bush Sides with Business over Lawsuits*, WALL ST. J., Aug. 16, 2007, at A4.

29. See Motion for Leave to File a Brief as Amici Curiae after the Filing Deadline and Brief Amici Curiae of the Honorable John Conyers, Jr. and Barney Frank, in Support of Petitioner, *Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (No. 06-43); Motion for Leave to File Brief out of Time and Brief Amici Curiae of Former SEC Comm’rs in Support of Petitioner, *Stoneridge*, 128 S. Ct. 761 (No. 06-43).

“scheme liability” claims fall outside the scope of section 10(b).³⁰ Indeed, while both the respondents and the Chamber argued that “scheme liability” fail to satisfy numerous elements of a private cause of action under section 10(b),³¹ the Solicitor General’s argument rested on only one—a failure to show the element of “reliance.”³² And that is precisely what the Court held.³³

So do the Roberts Court’s decisions in business cases indicate that the Court in fact is pro-business, as is typically assumed, or is the Court instead pro-government? To be sure, it often may not make any difference. In cases during the Roberts Court in which both the United States and the Chamber of Commerce have filed amicus briefs supporting one party over the other, the Solicitor General and the Chamber have advocated for the same disposition on a majority of occasions.³⁴ That may be unsurprising given that, throughout the tenure of Chief Justice Roberts and Justice Alito, the Solicitor General’s client has been an administration considered sympathetic to business interests. But the Solicitor General and the Chamber have not always been aligned. And when the Solicitor General and the Chamber have disagreed about the proper disposition of a case as amici curiae, the Court has overwhelmingly sided with the Solicitor General, a point to which we now turn.

II. OUR STUDY

A. Methodology

To explore the comparative strengths of business interests and the Solicitor General in affecting the Court’s decisions, we devised a simple empirical study of the Roberts

30. *Stoneridge*, 128 S. Ct. at 766.

31. See generally Brief for Respondents, *Stoneridge*, 128 S. Ct. 761 (No. 06-43); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondents, *Stoneridge*, 128 S. Ct. 761 (No. 06-43).

32. See Brief for the United States as Amicus Curiae Supporting Affirmance at 17–26, *Stoneridge*, 128 S. Ct. 761 (No. 06-43).

33. *Stoneridge*, 128 S. Ct. at 770 (“[W]e conclude respondents’ deceptive acts, which were not disclosed to the investing public, are too remote to satisfy the requirement of reliance.”).

34. See *infra* Part II.B.

Court's business-related decisions. We constructed a unique data set of every business-related decision handed down by the Supreme Court between January 31, 2006, when Samuel Alito was sworn in as Associate Justice, and February 1, 2009.³⁵ For each decision, we coded the Court's judgment and each individual Justice's vote as either supporting or opposing the result more favorable to business.³⁶ We also coded each case for whether the United States had participated, either as a party or as *amicus curiae*, and whether the United States had supported the result favorable or unfavorable to business. Finally, we coded each case for whether the United States Chamber of Commerce had participated,³⁷ a reasonable indication of the decision's importance to the business community, and the salience of the business aspect of the case to the Justices.

As is inevitably the case when creating a data set of this sort, a party's position in a particular case—or the Court's decision—may defy ready categorization. As one example, in *Credit Suisse Securities (USA) L.L.C. v. Billing*,³⁸ the petitioner, supported by the Chamber of Commerce, argued that coordinated activity by members of an underwriting syndicate pursuant to the securities laws was immune from scrutiny under the antitrust laws. The Solicitor General, while supporting the petitioner in many respects, filed a brief supporting neither party because the government would have

35. The complete data set (as a Microsoft Excel file) and accompanying codebook are available for download at the following address: <http://claranet.scu.edu/eres/coursepage.aspx?cid=2525&page=docs>.

36. We constructed the data set in the following manner:

First, we examined the Supreme Court's decisions in the United States Reports in chronological order, beginning in January 2006, to determine which cases addressed issues of significance to the business community. We excluded those decisions in which significant business interests were represented on both sides of a case, as such cases would be unhelpful in exploring a "pro-business" or "anti-business" disposition.

Second, we coded the decisions for various conditions. The most significant were (1) whether the outcome was favorable to business interests; (2) whether the votes of each individual Justice were favorable to business interests; (3) whether the United States participated, as a party or as *amicus*; (4) whether the position advocated by the United States was favorable to business interests; and (5) whether the Chamber of Commerce participated in the case.

37. In most cases where the Chamber participated, it did so as *amicus curiae*. In one case included in the data set, *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008), the Chamber was actually a party.

38. *Credit Suisse Sec. (USA) L.L.C. v. Billing*, 127 S. Ct. 2383 (2007).

allowed a remand to permit the plaintiff-respondents to amend their complaint.³⁹ The Court sided with the petitioner (and the Chamber), and did not afford any opportunity for an amendment of the complaint.⁴⁰ While the Solicitor General and the Chamber of Commerce disagreed on the question whether the plaintiff-respondents should have been given a chance to amend their complaint, we treat the case as one in which the Solicitor General and the Chamber were in agreement because the government's position ultimately was much closer to that of petitioner and the Chamber than that of the plaintiff-respondents. (As one indication, the government divided argument time with the petitioner rather than the respondent.) While certain other cases similarly defied immediate categorization, such cases were few in number, and in most instances, the proper coding was straightforward.

B. Results

During the three years between January 30, 2006, and February 1, 2009, the Supreme Court handed down sixty-six decisions on the merits addressing legal issues directly relevant to American businesses where one of the possible outcomes was identifiably favorable to business.⁴¹ Overall, the Roberts Court reached outcomes favorable to business interests in forty-three (or 65.2%) of these cases. The United States Chamber of Commerce filed a brief as *amicus curiae* in thirty-nine of these sixty-six cases, and it was the litigating party in one additional case. In these forty cases, the Court reached the result advocated by the Chamber in twenty-six (or 65.0%) of its decisions, roughly the same rate at which it found in favor of business interests overall.

39. See Brief of the United States as Amicus Curiae in Support of Vacatur at 28, *Billing*, 127 S. Ct. 2383 (No. 05-1157).

40. *Billing*, 127 S. Ct. at 2397.

41. Over this time frame, the Court also decided a number of cases in which the question presented involved opposing business interests, such that certain business groups were involved on both sides. (A good example is *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007).) We excluded these cases from our study because, though they obviously are business related, they cannot offer any insight into whether the Roberts Court has been favorable to "business interests" writ large.

The Office of the Solicitor General, acting on behalf of the Bush administration, filed a brief as *amicus curiae* in thirty-seven business-related cases (as defined above) over this same time frame, supporting the result favorable to business in twenty (or 54.1%) of these cases. There were a total of twenty-seven cases in which the United States and the United States Chamber of Commerce both participated as *amicus curiae*, and they advocated the same position in thirteen (48.1%) of these cases. In addition, there were four cases in which the government was a party and the Chamber of Commerce weighed in against the government,⁴² and one case in which the government was a party and the Chamber sided with the government.⁴³

Table 1. Win rates for business interests in business-related decisions handed down by the Supreme Court under various conditions, January 30, 2006, to February 1, 2009.

Condition	Number of Decisions	Proportion of Decisions Favoring Business Interests (%)
All business-related cases	66	65.2
Chamber of Commerce participated	40	65.0
Chamber of Commerce participated but United States did not	8	100.0
Chamber of Commerce and United States agreed	14	92.9
Chamber of Commerce and United States disagreed	18	27.8

Perhaps most interesting for our purposes is what happened in the fourteen cases in which the Bush

42. These cases are *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007), *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007), *FEC v. Wis. Right to Life*, 127 S. Ct. 2652 (2007), and *Rapanos v. United States*, 547 U.S. 715 (2006).

43. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

administration and the Chamber of Commerce advocated opposing positions as amici curiae. Here, the Court sided with the government, and against the Chamber, in thirteen of the fourteen cases—every case other than *Allison Engine Co. v. United States ex rel Sanders*.⁴⁴ Thus, although the Court reached the result favored by the Chamber in roughly two-thirds of its business cases overall, it did so only once in the fourteen cases where its view was opposed by the Bush administration in an amicus brief.

Table 2. Win rates for the United States government in business-related decisions handed down by the Supreme Court under various conditions, January 30, 2006, to February 1, 2009.

Condition	Number of Decisions	Proportion of Decisions Favoring Government's Position (%)
United States participated	47	78.7
United States participated as a party	10	30.0
United States participated as amicus curiae	37	91.9
United States and Chamber of Commerce disagreed as amicus curiae	14	92.9

In contrast, the Court reached the result favorable to business interests in all thirteen cases in which the Solicitor General and the Chamber argued for the same outcome as amici, in four of the five cases in which the Chamber participated and the government was a party, and in all eight cases in which the Chamber participated but the Bush administration did not. In other words, the Chamber prevailed in twenty-five of the twenty-six business cases in which the Solicitor General did not file an amicus brief supporting the other side. Interestingly, although the Court overwhelmingly adopted the position advocated by the

44. *Allison Engine Co. v. U.S. ex rel Sanders*, 128 S. Ct. 2123 (2008).

Solicitor General as amicus when the government disagreed with the Chamber, the Court sided with the Chamber in all four cases in which the government and the Chamber disagreed and the government was a party.

Table 3. Proportion of votes for outcomes favoring business interests by Chief Justice Roberts and Justice Alito in business-related decisions handed down by the Supreme Court under various conditions, January 30, 2006, to February 1, 2009.

Condition	Roberts (%)	Alito (%)
All business-related decisions	66.7 (N=64)	67.2 (N=58)
Chamber of Commerce participated	67.5 (N=40)	64.7 (N=34)
United States did not participate or agreed with Chamber	95.5 (N=22)	100.0 (N=17)
Chamber of Commerce and United States disagreed	33.3 (N=18)	29.4 (N=17)
Chamber of Commerce and United States disagreed as amicus curiae	14.3 (N=14)	7.7 (N=13)

As one might have expected, the voting records of the two new Justices—Chief Justice Roberts and Justice Alito—were almost a perfect reflection of the results produced by the Court as a whole. As table 3 illustrates, both tended to vote for outcomes favorable to business interests, especially so when the Chamber of Commerce filed a brief in the case and the United States either supported the Chamber's position or did not participate. (Indeed, Justice Alito has yet to vote against the Chamber under these conditions.) But Roberts and Alito—like the Court as a whole—voted quite differently in cases in which the Solicitor General opposed business litigants, especially when he did so as an amicus.

III. DISCUSSION

Before discussing the possible implications of these results, a few cautionary notes are in order. First, in many senses it is overly simplistic to evaluate the Court's decisions along the dimension of "pro-business" or "anti-business."

While these tags might be helpful as very general descriptors, they do not capture the various and nuanced ways in which the Justices actually understand and decide the cases before them. Though the consequences of a given decision for commercial enterprise may well affect the Justices' choices, either consciously or unconsciously, their decision making is certainly influenced by a number of other perspectives bearing on the case, such as their views about the proper scope of national power in a preemption case or the problem of racial or gender discrimination in an employment case.

Indeed, it seems reasonable to suppose that these other considerations are often more immediately salient to the Justices than a given decision's impact on business. This might help explain a commonality among many of the cases that the Roberts Court decided against the Chamber. Nine of the twelve cases in which the Court sided with the government and against the Chamber where both participated as *amicus curiae* involved employment discrimination, labor, or ERISA issues. Here, the Court's decisions may well have been largely determined by factors unrelated to the cases' implications for American businesses, such as the Justices' views about racial or gender discrimination, about the employment relationship more generally, or about the specific statutory provisions in question. In short, "pro-business" or "anti-business" might have limited currency as meaningful labels in explaining the Court's work.

Second, a simple empirical study like ours merely counts the number of outcomes going in one direction or the other. It therefore treats each decision as equally significant, without any weighting to account for their relative importance. Insofar as the Court might act differently in business cases depending on a legal issue's greater or lesser significance to the business community—no doubt, a plausible hypothesis—our analysis would fail to capture that phenomenon.

Third, our study merely measures the "win rates" of particular actors—business litigants, the Chamber of Commerce, and the United States—in cases decided by the Supreme Court on the merits. Though helpful as a rough gauge, such a measure can nonetheless be misleading as an indication of the Justices' underlying attitudes because it necessarily depends on the mix of cases the Court decides.

For example, due to the independent choices made by litigants, the lower courts, and the Justices at the certiorari stage, it is conceivable that the pool of business cases decided by the Court over the past three years disproportionately involved lower court judgments that were generally favorable to plaintiffs. If so, the Court could have decided a majority of these cases in favor of business litigants while still holding a generally pro-plaintiff, anti-business disposition. In other words, decisional outcomes are a product of not just the Justices' votes but also the questions presented. Because the frame set by those questions might be slanted in one direction or another, win rates represent a somewhat adulterated reflection of the Justices' underlying views.

With these caveats in mind, a cursory review of our results still lends a modicum of support to the conventional wisdom that the Roberts Court is friendly to the interests of American business. Over the past three years, business litigants have prevailed in roughly sixty-four percent of the Court's decisions on the merits. But a closer examination of the data—particularly one that considers the success in these cases of the Solicitor General—makes it much more difficult to determine whether the current Court has actually been “pro-business.”

Unsurprisingly, the Bush administration tended to support the position favored by business interests, though perhaps not as often as one might have expected. Of course, it may be that, while the Bush administration only supported the Chamber of Commerce in roughly half of the cases in which they both participated as amici, it did so disproportionately in the most significant cases. Indeed, David Franklin makes a persuasive case in his article for this symposium that the cases that the Chamber has lost before the Roberts Court (i.e., the ones in which the government has opposed the Chamber) have tended to be less important to the business community.⁴⁵

More interesting—and more important to ascertaining whether the Roberts Court has been “pro-business” or “pro-government”—is what happened in those cases in which the

45. See David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019 (2009).

Chamber and the Solicitor General opposed one another. The Bush administration's reputation as a proponent of business interests suggests that, when it took a position before the Court against the interests of business, those arguments would have carried a fair measure of credibility with the Justices. And our study seems to bear this out: although the Chamber prevailed in twenty-one of the twenty-two cases in which the government either supported the Chamber or did not participate, the Chamber lost in thirteen of the fourteen cases in which the Solicitor General supported the other side as *amicus curiae*. The government's success rate in these fourteen cases is tempered somewhat by its poor showing in the four cases in which it was a principal party and the Chamber filed an opposing *amicus* brief. But even if we consider all of the cases in which the government participated (whether as a party or as *amicus*), the Solicitor General still fared quite well when it opposed the Chamber, prevailing in more than seventy-two percent of such cases.⁴⁶

The potential influence of the Solicitor General in the Roberts Court's resolution of business cases complicates any conclusions we might draw about the current Court's general disposition towards business interests. It suggests that the Court has cared as much—and perhaps more—about the views of the federal government as those of the business community. Indeed, the recent spate of cases going against business interests and in favor of the government perhaps could be seen to indicate that the Roberts Court is more “pro-government” than “pro-business,” and that the Court's sympathy for commercial enterprise may actually be

46. There may be room for debate on whether the cases in which the government appears as an *amicus* shed more light on the significance of the government's position than cases in which the government is a principal party. To a certain extent, the government has greater freedom to shape its position when it appears as an *amicus*: the government will not have been involved in the litigation as a party and therefore will not be constrained by any positions taken in prior proceedings in the case; and conversely, when the government is a party to the proceedings, it generally defends a favorable result unless there is no reasonable argument supporting it. The difference in the government's freedom to develop its position may be limited, however, because the government's views as an *amicus* will necessarily be shaped by the government's position in previous cases raising similar issues, the relevant administrative positions taken by a government agency, and the government's institutional interests.

moderating.

But these conclusions, too, are problematic. As to the influence of the Solicitor General, there are three problems in concluding that the Roberts Court is “pro-government” in business-related cases. First, there was likely a pre-existing ideological affinity between the Roberts Court and the Bush administration. After all, two of the Justices currently serving on the Court were nominated by President George W. Bush, and five of the remaining seven Justices were appointed by Republican Presidents.⁴⁷ Thus, when the Solicitor General argued for certain positions, the Court was apt to be receptive. In other words, the win rate of the Solicitor General may simply reflect the fact that the Court and the Bush administration tended to see these legal issues the same way.

Second, as discussed above, given the Bush administration’s ideological reputation, its arguments against business likely had a fair measure of credibility with the Court. To some extent, they represented arguments against ideological interest, and thus carried a special imprimatur of reliability. Thus, the Solicitor General may have been influential, but more due to the administration’s ideological reputation than a general inclination by the Roberts Court to side with the federal government.

Finally, it is important to keep in mind that the Solicitor General’s record was hardly perfect. Specifically, in all four cases in which the government was a principal party (rather than an amicus) and was opposed by the Chamber, the Court ruled against the Solicitor General and in favor of the Chamber’s position.

Taken together, these considerations mean that the results of our study cannot be taken to show that the Solicitor General’s views are more important to the Roberts Court than those of the business community. To make the point more concretely, the Roberts Court’s responsiveness to

47. See Rosen, *supra* note 2. For the most part, Justice Breyer’s record seems to have borne out these views. See, e.g., *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (opinion for the Court of Breyer, J.) (holding that punitive damages award based on third-party harm was precluded by the Due Process Clause); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (opinion for the Court of Breyer, J.) (holding that District of Columbia tort law is preempted by federal statute).

arguments presented by the Obama administration—particularly if and when the Solicitor General takes positions unfavorable to business—might differ markedly from what we saw during the Bush administration.

Moreover, we should not necessarily interpret the Chamber's recent string of losses as an indication that the Roberts Court's "pro-business" predisposition (to the extent it actually exists) has waned. After all, in nearly every case the Chamber has lost during the tenure of the Roberts Court, a reputedly pro-business Bush administration opposed the Chamber. These decisions may therefore indicate little more than that, although the Court is favorably inclined towards business interests, it is not *so* favorably inclined as to rule for business litigants even when an apparently pro-business government argues that the law will not permit such a result.⁴⁸ In other words, the Chamber's losses may only testify to a very strong signaling effect attached to anti-business arguments presented by a Republican Solicitor General.

CONCLUSION

In the end, much remains uncertain about the degree to which the Roberts Court is influenced by the views of the business community or the federal government. To the extent such descriptors like "pro-business" or "pro-government" are meaningful, it is too soon to tell whether the Roberts Court is one or the other, neither, or both. For example, the Court's 2007 Term, which included decisions such as *Riegel v. Medtronic, Inc.*⁴⁹ and *Chamber of Commerce v. Brown*⁵⁰—decisions agreeing with the Solicitor General that the

48. This point has not evaded the press. As Linda Greenhouse wrote after witnessing an oral argument in which she believed that the Court would side against employees even when the government supported them: "Beneath the surface of a Supreme Court argument on Monday in a case of job-related age discrimination was a surprising question: has the Supreme Court drifted so far toward the employer's side in job discrimination cases that it is now to the right of the Bush administration?" Linda Greenhouse, *Justices Express Skepticism in a Discrimination Case*, N.Y. TIMES, Dec. 4, 2007, at A26. As it turns out, the Court unanimously accepted the government's general position in that case. See *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008).

49. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008).

50. *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008).

relevant state law claims were preempted—led many to conclude that the Justices were sympathetic to business litigants' expansive conceptions of federal preemption. But the Court's recent 2008 Term decisions in *Altria Group, Inc. v. Good*⁵¹ and *Wyeth v. Levine*⁵²—both of which rejected preemption claims in important contexts, one consistent with the position of the Solicitor General and one in opposition to it—have muddled the picture considerably. Perhaps the supposed “preemption wave” has crested, even when the federal government supports such claims. Or perhaps the “wave” was always more perception than reality.

Regardless, it is possible the picture will grow clearer in the near future. We may learn a fair amount as the Roberts Court begins to render decisions in a new ideological environment, responding to arguments presented by a federal government presumably with a different set of legal policy priorities. Because the Court is apt to be less ideologically aligned with the Obama administration than it was with the Bush administration—and because the new Solicitor General's arguments against business interests are unlikely to have the same signaling effect to the Justices as those of the past administration—upcoming decisions pitting the Chamber of Commerce against the Obama administration might well afford us a new, more illuminating perspective on these questions. Time will tell.

51. *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) (holding that state law consumer fraud claims concerning the marketing of cigarettes as “light” or “low tar” are not expressly preempted by the Federal Cigarette Labeling Act or impliedly preempted by the regulatory actions of the Federal Trade Commission).

52. *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (holding that the Food and Drug Administration's approval of a pharmaceutical as “safe and effective” with a specific warning label does not preempt state tort failure-to-warn claims).
